

COMMISSION FOR THE PRESERVATION OF WILD HORSES ET AL.

IBLA 94-126, 94-127, 94-128

Decided July 14, 1997

Appeal from a Decision issued by the District Manager, Elko District, Elko, Nevada, Bureau of Land Management, finding no significant impact and implementing the Goshute Wild Horse Gather Plan. NV 010-85-047, NV 010-94-05.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A BLM decision implementing a wild horse area management plan is affirmed when it is founded on a reasoned analysis of monitoring data supporting reduction of a horse population to restore a range to a thriving natural ecological balance and prevent its deterioration.

APPEARANCES: Catherine Barcomb, Sparks, Nevada, for the Commission for the Preservation of Wild Horses; Dawn Y. Lappin, Reno, Nevada, for the Wild Horse Organized Assistance; Anna E. Charlton, Esq., Newark, New Jersey, for Michael Blake, Public Lands Resource Council, and Timothy Wilson; and Rodney Harris, Elko District Office, Elko, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Commission for the Preservation of Wild Horses (CPWH), Wild Horse Organized Assistance (WHOA), and Michael Blake, together with the Public Lands Resource Council and Timothy Wilson, have appealed from an October 15, 1993, "full force and effect" Decision Record and Finding of No Significant Environmental Impact that implemented a wild horse gather in the Goshute Herd Management Area (HMA) of the Wells Resource Area, Elko District, Bureau of Land Management (BLM). The Decision Record implements management decisions made in an August 2, 1993, Amendment (Approved RMP Amendment) to the Wells Resource Management Plan (Wells RMP). Docketed as three separate cases, each of these appeals is directed against the same BLM Decision; they are now consolidated.

The Wells Resource Area is in the northeastern corner of Nevada. A census in 1981 found about 700 wild horses and burros within the resource area in 6 herds. (Proposed Wells RMP and Environmental Impact Statement (EIS) at S-2.) The Wells Record of Decision (1985 ROD), effective July

1985, provided that wild horse and burro herds in the resource area would be maintained between 550 and 700 animals and that management area plans would be developed for each of the 6 herd areas. Under this plan, horses inhabiting checkerboard areas (lands where public, private, and state ownership continuously intersect) were to remain while BLM undertook responsibility for removing horses from private lands if requested to do so. (1985 ROD at 7, 19.)

The Decision on appeal, which implements the RMP Amendment, provides methods to be used to gather 90-100 "excess" adoptable horses from the Goshute Herd Management Area. The Decision was issued on October 15, 1993, and the gather took place then. In identical Statements of Reasons on appeal (SOR), CPWH and WHOA request a stay from the Board "preventing the further removal of horses from the Goshute Herd Area pending resolution of this appeal." (SOR at 6.) The authority of this Board, however, does not extend to control of possible future action by BLM, but is limited to the review of decisions issued by BLM that are reviewable under 43 C.F.R. § 4.1. Because we do not exercise supervisory control over BLM, the requests for a stay of future BLM action are denied.

The CPWH and WHOA further allege that they were denied adequate notice of the final Decision because they received the final environmental assessment and gather plan 6 days after capture of the horses was completed. They maintain that they had "no opportunity to comment, appeal, appeal with a request for a stay of the action, or if necessary, file an injunction" in violation of Federal Land Policy and Management Act, National Environmental Policy Act, and "BLM Regulations and Policy." (SOR at 1.)

Departmental regulation 43 C.F.R. § 4770.3(c) (1993) provides that "[f]ull force and effect decisions shall take effect on the date specified, regardless of an appeal." This regulation has been upheld as consistent with the "statutory language and the legislative history of the Wild Horse Act, as amended." *Blake v. Babbitt*, 837 F. Supp. 458, 461 (D.D.C. 1993). In these cases, BLM assumes the risk that a decision placed into full force and effect may be reversed by the Federal courts, which gain immediate jurisdiction to review a decision placed into full force and effect. See *Blake v. Babbitt*, *supra*, at 460-61.

Blake argues that BLM is removing wild horses from the Goshute HMA "without proper data and justification." (Blake SOR at 6.) He alleges that BLM did not determine there were "excess" horses in the Goshute HMA, and that the gather is in violation of 16 U.S.C. § 1333(a) (1994), which requires that horses be managed at a "minimal feasible level." (Blake SOR at 4-5.) He contends BLM's removal plan is based on a "presumption that the wild horse herds will continue to reproduce at a rate of 15-20 percent per year." This presumption is not supported in fact, he argues, because overgrazing and drought have increased young adult horse mortality and decreased reproduction. "No round-ups should take place until the herd counts and herd demographics are established," he maintains. *Id.* at 5.

Blake alleges BLM's plans do not address whether removal of 90-100 horses of adoptable age will "seriously disturb the genetic make-up of this herd."

Id. He asserts that "the information upon which the round up proposal is made is so inaccurate that it cannot form the basis of a proper exercise of the power to manage the wild horse herds" and calls for the development of a comprehensive EIS based upon "BLM's admissions that wild horse herds are in jeopardy and suffering massive death losses in Nevada." Id. at 6.

The CPWH and WHOA argue that BLM has biased its decision pertaining to herd size against wild horses and in favor of livestock, and they oppose the elimination of checkerboard lands from the HMA. They argue that BLM's decision to limit allocation of pre-livestock forage to 10 percent of available forage is arbitrary and that "[a]llowable use criteria established in the Nevada Rangeland Monitoring Handbook suggests moderate to heavy [use] (50 to 90 percent) for fall grazing seasons." (SOR at 3.) It is said that allocating forage in this way "will eliminate competition for the livestock yet, not protect the critical winter use area for wild horses from livestock competition." Id. Further, they contend that BLM has not established that 10-percent range utilization during the fall months will sustain the 160 horses inhabiting the Goshute HMA. Finally, they argue that BLM's decision to limit the herd size to 160 horses is in error because no carrying capacity was established to justify the initial herd. Id. at 5.

The goal of wild horse management is to maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation and to protect the range from the deterioration associated with overpopulation. 16 U.S.C. § 1333(a) (1994); Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984); Animal Protection Institute of America, 118 IBLA 20, 23 (1991). "[E]xcess animals" are defined as those "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1994). A determination that removal is warranted must be based on research and analysis and on monitoring programs that include studies of grazing utilization, trends in range condition, actual use, and climatic factors. Michael Blake, 135 IBLA 9, 14 (1996); Animal Protection Institute of America, 117 IBLA 4, 5 (1990).

Citing monitoring studies used to measure horse utilization in December 1990, the Wells RMP Amendment, as proposed, concluded there was a 59-percent utilization rate prior to livestock entry. Id. at 14. Appellants have not refuted this information, but argue that limiting utilization to 10 percent prior to livestock use is arbitrary. In answer to this argument, BLM replies:

The district took all the best available data and the professional judgement of several range conservationists and wild horse specialists to make this decision. Data shows that 40-50 percent utilization prior to livestock turnout on winter use areas leads to severe use at the end of the combined use period.

The 10 percent utilization level, which is the midpoint of the slight use

category, given to wild horses prior to livestock turnout in winter use areas is a starting point. It is believed that continued monitoring will prove that the 10 percent utilization prior to livestock turnout will protect wild horse winter range and will result in proper use at the end of the combined use period. Monitoring may show that utilization prior to the entry by livestock can be higher and still meet key area utilization goals and adjustments will be made in the allotment evaluation process.

(BLM Answer at 2.b.; see also Nevada Rangeland Monitoring Handbook (Sept. 1984) at 20-24.)

[1] Appellants have not provided the Board with any evidence refuting the information upon which this conclusion rests; nor have they offered evidence to show that BLM's experts erred "when collecting the underlying data, when interpreting that data, or in reaching the conclusion" challenged by Appellants. Animal Protection Institute of America, Inc., 118 IBLA 63 (1991). Nor is BLM required to wait until the range is damaged before it takes preventive action; proper range management dictates herd reduction before it causes damage to the rangeland. The optimum number of horses is somewhat less than the number that would cause damage. See Michael Blake, 135 IBLA 9, 15 (1996). If the record establishes current resource damage or a significant threat of resource damage, removal is warranted. Id.

To the argument raised by Appellants that BLM has not supported its decision to limit horses in the Goshute HMA to 160 animals, BLM responds:

The initial carrying capacity or herd size for wild horses in the Goshute HMA is identified in the Amendment. This was determined based on the best available data and professional judgement. Multiple use decisions are currently being prepared.

The Goshute HMA contains all or part of 7 different grazing allotments. When the multiple use decisions are final for the allotments making up the majority of the Goshute HMA, an appropriate management level for wild horses as well as livestock can be made. Until that time, the initial AML for wild horses within the Goshute HMA is 160.

(BLM Answer at 4.)

This defense of BLM planning for the removal is supported by the Draft and Proposed Amendments to the Wells RMP, which report the results of horse monitoring studies conducted in 1989, 1990, and 1991. (Proposed Amendment at 7, 12, and 14; Draft Amendment at 6, 8, 11, 12, 14, and 15.) Appellants have not shown that the reported data or the conclusions drawn therefrom

are in error. Therefore, they have not sustained their burden of persuasion on this issue. See Animal Protection Institute of America, 117 IBLA 208, 216 (1990).

Nor have Appellants offered evidence supporting their contention that BLM damaged the genetic makeup of the herd by removing "adoptable" horses that are most likely to contribute to a strong herd. Finally, we find that the EA for the Goshute HMA Wild Horse Gather, the Approved Wild Horse Amendment and Decision Record, and the Draft Wild Horse Amendment and Environmental Assessment are properly tiered to the EIS found in the 1985 Wells Proposed RMP and approved by the 1985 Wells Record of Decision; therefore, BLM was not required to prepare another EIS in order to undertake this action. See Michael Blake, 135 IBLA 9, 16 (1996).

To the extent Appellants have raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

---

Franklin D. Arnese  
Administrative Judge

I concur:

---

James L. Byrnes  
Chief Administrative Judge